In forma pauperis
Petition not printed

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

NO. 149

LEWIS WILCOXON,
Petitioner,

v.

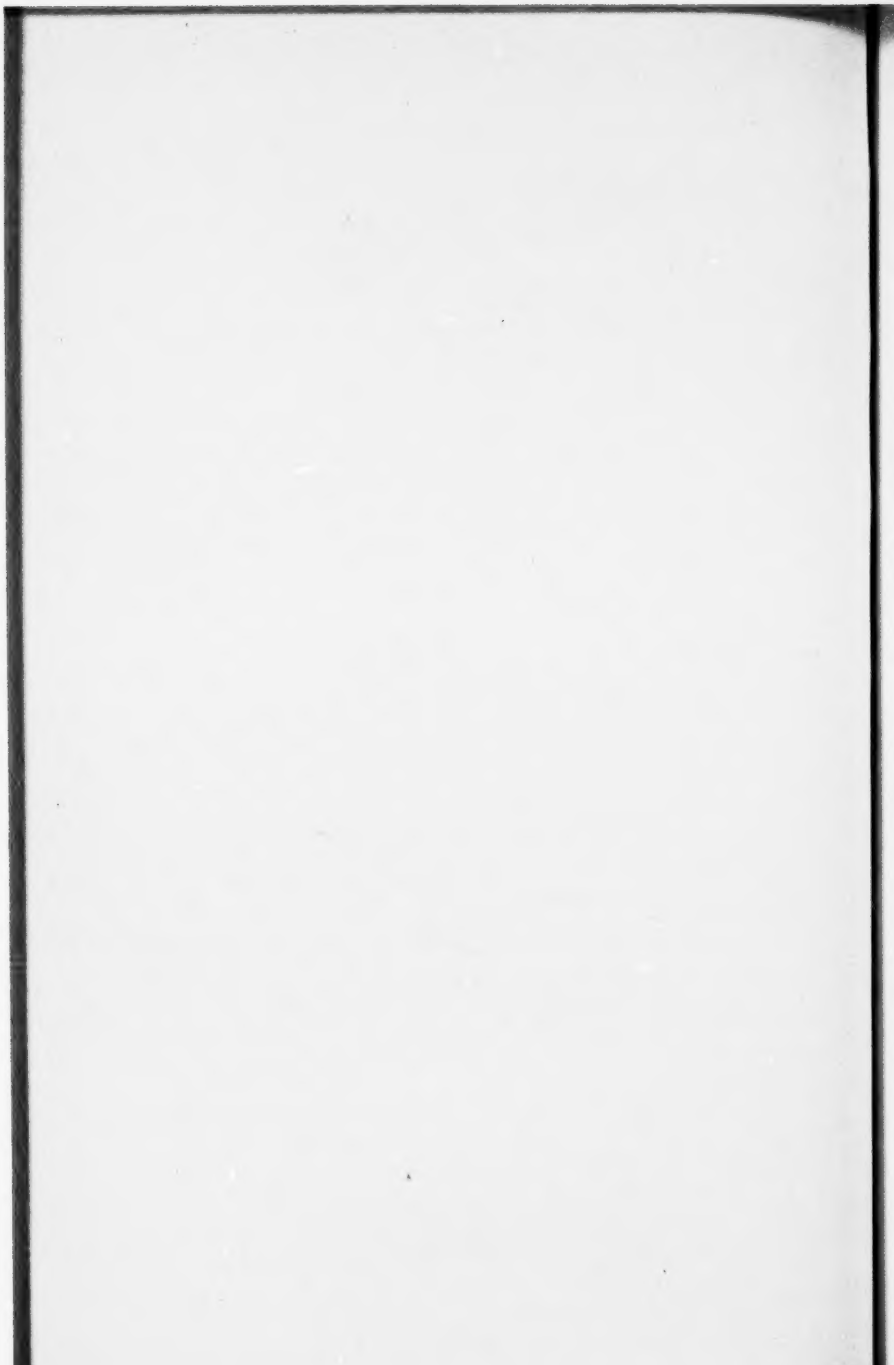
J. M. MOUNT, Sheriff,
(Successor to Aldredge, Sheriff),
Respondent.

BRIEF OF J. M. MOUNT, SHERIFF, RESPONDENT, IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI TO SUPREME COURT OF GEORGIA.

H. G. VANDIVIERE, Solicitor-General,
Blue Ridge Judicial Circuit.

JOHN A. BOYKIN, Solicitor-General,
Atlanta Judicial Circuit.

DURWOOD T. PYE, Assistant Solicitor-General, Attorneys for J. M. Mount, Sheriff, Respondent.



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BRIEF OF J. M. MOUNT, SHERIFF, RESPONDENT, IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI TO SUPREME COURT OF GEORGIA.

PART ONE

STATEMENT OF CASE

Lewis Wilcoxon, colored, was convicted in the Superior Court of Cobb County, Georgia, in the Blue Ridge Judicial Circuit, for the offense of rape, and sentenced to be executed. While confined in the jail of Fulton County, pending execution, and without moving for new trial in the court and Circuit of his conviction, he, through present counsel, brought habeas corpus in the Superior Court of Fulton County in the Judicial Circuit where confined.

In the habeas corpus petition he attacked his trial and conviction as void under the Fourteenth Amendment, be-

cause, (1) he was denied equal protection of the laws in that colored persons were systematically excluded on account of their color, so he alleged, from the jury-lists of Cobb County, and, (2) he was denied due process of law in that he was deprived of the benefit of counsel for that the counsel appointed by the court to defend him were so ignorant, inexperienced or grossly lacking in appreciation of their responsibility as to amount to virtually no representation. The judge of Fulton Superior Court ordered the writ to issue and upon the hearing dismissed it ex mero motu without hearing evidence. The Supreme Court of the State affirmed as to the charge that the jury lists were wrongly prepared, holding this no ground for habeas corpus, but reversed as to the charge of denial of counsel and remanded the case for further action upon that issue, refusing to determine the question by an inspection of the allegations of the petition. *Wilcoxon v. Aldredge, Sheriff, 192 Ga. 634.*

Upon the subsequent habeas corpus trial the judge excluded as irrelevant proffered evidence designed to support the charge of exclusion of colored persons from the jury lists of Cobb County, which evidence was offered, as petitioner stated, as illustrative of the charge he was denied the benefit of counsel. After hearing evidence upon the issue of counsel vel non, the judge decided that issue adverse to petitioner, and the Supreme Court of the State affirmed, holding that the evidence admitted, together with that excluded, required a finding that petitioner was not denied the benefit of counsel. *Wilcoxon v. Aldredge, Sheriff, 193 Ga. 661.*

PART TWO

ARGUMENT AND CITATION OF AUTHORITY SUMMARY

A. EQUAL PROTECTION OF THE LAWS.

Petitioner's contention he was denied the equal protection of the laws by alleged exclusion of colored persons

from the jury lists is without merit. This contention should have been made before the trial or upon the trial or thereafter by motion for new trial. The Georgia law affords ample opportunity to make such contention in these ways, but does not permit it to be first made on habeas corpus brought to nullify the trial. The decision of the Supreme Court of Georgia that these contentions were waived because not seasonably made was in keeping with the settled rule in the State and also in keeping with the rule in other States and in the Supreme Court of the United States. In enforcing this rule in this case the State court deprived petitioner of no federal right because federal rights like other rights must be asserted according to the law and not against the law.

Petitioner could acquire no greater right to attack the jury lists for violation of the Federal Constitution by bringing habeas corpus in the State court, than he could acquire by a like proceeding in the United States courts. Had he brought habeas corpus in the United States court the rule of waiver would have been applied. The Supreme Court of the United States will not require the Supreme Court of Georgia to adopt for Georgia a rule not permitted in the Supreme Court of the United States, particularly when such rule would be contrary to settled law in Georgia.

B. DUE PROCESS AND BENEFIT OF COUNSEL.

In Georgia the Constitution and laws require counsel for an accused in every case. Petitioner was furnished counsel as required by these laws and the Supreme Court of the State has so adjudged.

The Fourteenth Amendment does not require the States to provide counsel in every case. That Amendment requires due process of law. Whatever that Amendment may require as to counsel, and whatever duty it may impose, was complied with in this case, for, judged by any standard,

the evidence on the habeas corpus trial demanded a finding that petitioner was afforded due process of law and the benefit of counsel.

The crime was committed in Cobb County September 22nd, 1940, and petitioner was arrested a few hours thereafter. He made a confession and was lodged in the jail of the adjoining County of Fulton where from time to time he was visited by relatives. November 1st or 2nd, the judge of Cobb Superior Court notified Mr. Claude Hicks, one of the younger members of the Cobb County bar, and Mr. Charles Pigue, a lawyer of twenty-five years' experience who enjoyed perhaps the largest practice at that bar, that they would be appointed to represent petitioner on his ensuing trial, and November 4th, the opening day of the court, these gentlemen were formally appointed. November 5th the counsel were granted leaves of absence to go to Fulton County to confer with accused, which they did, and upon returning caused members of his family named by him as witnesses to be subpoenaed. Mr. Pigue studied the case and the law applicable thereto. November 6th the grand jury indicted. November 8th the case was called for trial. One of the witnesses subpoenaed (sister-in-law of accused) brought word to accused and his counsel that neither she nor any other member of his family knew anything of his claimed alibi and that they "were not going to have anything to do with it." Accused upon learning this expressed his wish that the trial not be continued until the following week (as it could have been and as he was told by counsel) but that it proceed. Counsel accordingly proceeded with the trial and rendered accused full and able representation. The evidence required a verdict of guilty and the jury convicted. The attacks now made upon appointed counsel are fully answered in this brief, and it clearly appears that each attack is without merit and altogether unsubstantial.

ARGUMENT

ALLEGED EXCLUSION OF NEGROES FROM JURY LISTS WAS NOT GROUND FOR HABEAS CORPUS.

Under Georgia law petitioner's remedy was to object before trial or upon the trial or thereafter by motion for trial and not otherwise.

We will here consider the question as to the alleged illegal formation of the jury lists in Cobb County solely as it relates to petitioner's contention that such formation of the lists constituted an independent ground for discharge on habeas corpus. Petitioner's contention that the failure of appointed counsel to raise this question on the trial shows that he was deprived of the benefit of counsel will be later considered on the discussion of the question of counsel vel non. We assume for the present discussion that petitioner had the benefit of counsel.

Under the law of Georgia new trials may be granted by the Superior Courts in any case of conviction therein of crime. Paragraph I of Section II of the Constitution of the State *(Code of Georgia of 1933, Sec. 2-201)* provides "The power of the Judges to grant new trials in case of conviction, is preserved." "The several Superior Courts shall have power to correct errors and grant new trials in causes or collateral issues depending in any of the said courts, in such manner and under such rules and regulations as they may establish according to law and the usages and customs of courts." *(Code of Georgia of 1933, Sec. 70-102).* Among the causes for which new trials may be granted are, (1) because the "verdict of a jury is found contrary to evidence and the principles of justice and equity," *(Code of Georgia of 1933, Sec. 70-202);* (2) "when any material evidence may be illegally admitted to, or illegally withheld from the jury," *(Code of Georgia of 1933, Sec. 70-203);* (3) in cases of newly discovered evidence, *(Code of Georgia of 1933, Sec. 70-204);* (4) where the verdict is against the weight of the evidence, *(Code of Georgia of 1933, Sec. 70-*

206); (5) for an erroneous charge to the jury or failure to charge, *(Code of Georgia of 1933, Sec. 70-207);* and, (6) for any other lawful reason not especially provided for, *(Code of Georgia of 1933, Sec. 70-208).* Ordinary applications for new trial (so far as here material) must be made during the term, *(Code of Georgia of 1933, Sec. 70-301).* In extraordinary cases motion for new trial may be made after the expiration of the term, *(Code of Georgia of 1933, Sec. 70-303).* In every case of denial of new trial by the Superior Court that judgment may be reviewed by the Court of Appeals or Supreme Court of the State, *(Code of Georgia of 1933, Sec. 6-901).*

At bar, petitioner did not move for new trial. When the habeas corpus was sued out by present counsel, the term of Cobb Superior Court at which he had been convicted had not expired and he might have filed an ordinary motion for new trial. (Affidavit of Judge Hawkins, Second Bill of Exceptions to Supreme Court of Georgia, pp. 21-22).

Under Georgia law an accused before indictment may challenge the grand jury considering his case for illegality in its formation, or after indictment he may move to quash the indictment or file a plea in abatement thereto on the ground of such illegality. *Reich v. State, 53 Ga. 73(2), 75; McFarlin v. State, 121 Ga. 329 (1); Tompkins v. State, 138 Ga. 465 (a, b).*

Likewise for illegality in the formation of the traverse jury panels put upon him accused upon arraignment may challenge the array. *Code of 1933, Sec. 59-803; Boon v. State, 1 Ga. (Kelly) 631; Campbell v. State, 48 Ga. 353 (3); Wilson v. State, 69 Ga. 224 (4); Carter v. State, 143 Ga. 632 (2c); Pollard v. State, 148 Ga. 447 (4); Haden v. State, 176 Ga. 304, 307 (4).*

Even after verdict of guilty new trial may be granted for defects propter affectum in the juries in cases where the point was not sooner made because of accused's igno-

rance thereof, there being no lack of diligence to charge him with knowledge. *Jordan v. State, 119 Ga. 443 (4); Wall v. State, 126 Ga. 549 (3); Atlanta Coach Company v. Cobb, 178 Ga. 544, 556; Perrett v. State, 16 Ga. App. 587.*

Petitioner at bar upon his trial in Cobb Superior Court made no attack whatever upon the jury lists of the County by plea, motion, challenge to array, or otherwise; nor following conviction did he move for new trial upon the ground such lists were illegally compiled and that on his trial he was ignorant thereof.

Unless objection to grand or traverse jurors is seasonably made before verdict, or by motion for new trial thereafter in cases where the objection may be first made by such motion, it is the law of Georgia that such objection is taken as waived and may not thereafter be urged. "It is always necessary that challenges to jurors should be in due time, or else there will be a conclusive presumption that the want of qualification has been waived by all concerned." *Jordan v. State, 119 Ga. 443; McFarlin v. State, 121 Ga. 329, 330.* See, *Davis v. State, 120 Ga. 843 (5); Phillips v. Brown, 122 Ga. 571.*

It is also settled law in Georgia that habeas corpus can not be used as substitute for ordinary remedial procedure. *McFarland v. Donaldson, 115 Ga. 567 (1); Harrell v. Avera, 139 Ga. 340; Smith v. Milton, 149 Ga. 28; Blackstone v. Nelson, 151 Ga. 706; Wells v. Pridgen, 154 Ga. 397 (1), 399; Strickland v. Thompson, 155 Ga. 125 (1); Fleming v. Lowry, 173 Ga. 894; Etheridge v. Potson, 176 Ga. 388; Shiflett v. Robson, 180 Ga. 23 (1), 26.* This is in accord with the rule in this court. *Ex parte Watkins, 3 Peters (U. S.) 193, 7 L. ed. 650; Ex parte Parks, 93 U. S. 18, 23 L. ed. 787; In Re Coy, 127 U. S. 731, 32 L. ed. 274; In Re Swan, 150 U. S. 651, 37 L. ed. 1207; Anderson v. Treat, 172 U. S. 24, 43 L. ed. 351; Frank v. Mangum, 237 U. S. 309, 59 L. ed. 969; Knewel v. Egan, 268 U. S. 442, 69 L. ed. 1036; Ashe v. Valotta, 270 U. S. 424, 70 L. ed. 662.*

Failure of an accused to seasonably complain of illegal formation of an indicting grand jury or of a convicting traverse jury under Georgia law is a waiver of such illegality and it may not be complained of on habeas corpus. "One imprisoned on a bench-warrant regular on its face and issued by a judge of competent jurisdiction will not be released on habeas corpus because the grand jury that found the indictment on which the warrant issued was illegal. A writ of error is the available remedy, the warrant not being void but merely voidable. . . . The accused may waive defects in the indictment, gross irregularities in selecting the grand or trial jury, and conceded disqualification of the grand or trial jurors. It has been held that after a conviction on an indictment regular on its face, yet alleged never to have been found by the grand jury, habeas corpus is not the remedy. *Ex parte Twohig, 13 Nev. 302.* It has also been held that the fact that the grand jury which found the indictment was illegal will not be considered upon hearing of habeas corpus. *Ex parte Springer, 1 Utah, 214.* . . . Objections to the grand jury must be made by challenge, or raised by plea in abatement, according to the circumstances. . . . The jurisdiction of the court is not destroyed or taken away by the alleged disqualification of the grand jury." *Smith v. Milton, 149 Ga. 28 (2, 3), 30, 31.* "Litigants have a legal remedy by challenge to the array of jurors on the trial of the case. *Carter v. State, 143 Ga. 632 (2c), 639." Teem v. Cox, 148 Ga. 175 (a).* Such is the rule in this court. "The objections that the grand jury was improperly constituted and that the defendant was denied compulsory process for witnesses go only to the regularity of the proceedings, not to the jurisdiction of the court." *Ex parte Harding, 120 U. S. 782, 30 L. ed. 824* " . . . the defect in the number of grand jurors did not vitiate the entire proceedings, so that they could be challenged collaterally on habeas corpus, but was only a matter of error, to be corrected by proceedings in error." *Ex parte Wilson, 140 U. S. 575, 35 L. ed. 513, 515.* "He may not lie by, as he

did in this case, until the time for the execution of the judgment comes near, and then seek to raise collaterally, by habeas corpus, questions not affecting the jurisdiction of the court which convicted him, and which if properly made then, could ultimately have come to this court upon writ of error. . . . Disqualifications of grand jurors do not destroy the jurisdiction of the court in which an indictment was returned, if the court has jurisdiction of the cause and of the person, as the trial court had in this case. (Cits.) The indictment, though voidable, if the objection is seasonably taken, as it was in this case, is not void. *United States v. Gale, 109 U. S. 65, 27 L. ed. 857.* The objection may be waived, if it is not made at all or delayed too long." *Keizo v. Henry, 211 U. S. 146, 148, 149, 53 L. ed. 125, 126. In Re Moran, 203 U. S. 96, 104, 51 L. ed. 105, 108; Harlan v. McGouin, 218 U. S. 442, 451, 54 L. ed. 1101, 1106.* "By pleading not guilty to an indictment, and going to trial without making any objection to the mode of selecting the grand jury, the objection is waived." *United States v. Gale, 109 U. S. 65 (2), 27 L. ed. 857 (2).* To the same effect as to the traverse jury: *In Re Schneider, 148 U. S. 162, 37 L. ed. 406.* And such is the rule elsewhere. *In Re Corcoran (Idaho), 58 Pac. 18; Ex parte Warris, 28 Fla. 371, 9 Sou. 718; In Re McElroy (Kan. App.) 58 Pac. 677; In Re Betts, 36 Neb. 282, 54 N. W. 524; State v. Fenderson, 28 La. Ann. 82.*

In the light of the foregoing laws of the State, what is petitioner's situation as to his contention, first made on habeas corpus, that members of his race were illegally excluded from the jury lists? The answer plainly is that the contention comes too late, that it should have been made on the trial or by motion for new trial; that by failing to make the contention in due time and in the manner provided by the State law petitioner has waived his rights therein and may not now, after staying his hand on the trial and thereafter deliberately refusing the orderly processes of motion for new trial and writ of error, assert by habeas corpus

that his conviction was wholly void and that he should be discharged of the punishment thereby imposed.

The Supreme Court of Georgia has determined no Federal question but has disposed of the case upon the State law which is binding upon petitioner in the Supreme Court of the United States.

And this is all that the Supreme Court of Georgia has held. That court has not decided that petitioner was or was not deprived of the equal protection of the laws. That court has not decided that the Cobb County jury lists were or were not illegally compiled, or that members of petitioner's race were or were not excluded from said lists on account of their color. The Supreme Court of Georgia has simply given force and effect to the settled laws of Georgia that such questions must be duly and timely raised and that when not so presented are to be treated as waived and may not thereafter be asserted by habeas corpus. Said the Supreme Court: "The applicant had the right to require a jury, both grand and petit, duly organized in accordance with constitutional principles; but he could not either negligently or purposely stand silently by in this respect, taking the chances of an acquittal, and upon conviction seek to thus nullify his trial." *Wilcoxon v. Aldredge, Sheriff, 192 Ga. 634, 637.*

In thus deciding the case in accordance with the uniform and unbroken law and practice in the courts of the State the Supreme Court of Georgia has determined no federal question in respect to the charge of illegal formation of the jury lists and no justiciable question of federal law is presented in this connection to this court. "The scope of a habeas corpus proceeding in the circumstances disclosed is a State and not a federal question." *Herndon v. Lowry, 301 U. S. 242, 247, 81 L. ed. 1066, 1069.* The basis of the State court's decision is the law and practice of the State "and the State law and practice in this regard are no less applicable when federal rights are in controversy than

when the case turns entirely upon questions of local or general law." *John v. Paullin, 231 U. S. 583, 585, 58 L. ed. 381, 383; Callan v. Bransford, 139 U. S. 197, 35 L. ed. 144; Brown v. Massachusetts, 144 U. S. 573, 36 L. ed. 546; Jacobi v. Alabama, 187 U. S. 133, 47 L. ed. 106; Hulbert v. Chicago, 202 U. S. 275, 281, 50 L. ed. 1026, 1028; Newman v. Gates, 204 U. S. 89, 51 L. ed. 385; Chesapeake and O. R. Co. v. McDonald, 214 U. S. 191, 195; 53 L. ed. 963, 965.* This court has no jurisdiction to review decisions based on State law. *McBride v. Hoyne, 11 Peters (36 U. S.) 167, 9 L. ed. 673; Congdon v. Goodman, 2 Black (67 U. S.) 574, 11 L. ed. 257; Palmer v. Marston, 14 Wall. (81 U. S.) 10, 20 L. ed. 826; Sevier v. Haskell, 14 Wall. (81 U. S.) 12, 20 L. ed. 827; de Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125; Quimby v. Boyd, 128 U. S. 488, 32 L. ed. 502; Avery v. Popper, 179 U. S. 305, 45 L. ed. 203; Smalley v. Laugenour, 196 U. S. 93, 49 L. ed. 400; Allen v. Allegheny Co., 196 U. S. 458, 49 L. ed. 551; Elder v. Badgley, 204 U. S. 85, 51 L. ed. 381; Sylvester v. Washington, 215 U. S. 80, 54 L. ed. 101; Lem Woon v. Oregon, 229 U. S. 586, 57 L. ed. 1340; John v. Paullin, 231 U. S. 583, 58 L. ed. 381.*

"The settled rule of a State court that objections to the manner of selecting grand jurors on behalf of one who has been indicted by such jurors must be taken by plea in abatement, and not by motion to quash the venire and panel, is binding on the Supreme Court of the United States on writ of error to the State court." *Tarrance v. Florida, 188 U. S. 519 (2), 47 L. ed. 572 (2).*

"Where the disposition of a federal question (is) not necessary to the determination of the cause, and the judgment is based on a distinct ground or grounds broad enough to sustain it, over which this court has no jurisdiction, the writ of error cannot be maintained." *Rogers v. Jones, 214 U. S. 196, 204, 53 L. ed. 965, 969.* "It is well settled by a long series of adjudications that to give this court jurisdiction by writ of error to a State court, it must appear affirma-

tively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the case, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it." *Wood v. Skinner, 139 U. S. 293, 35 L. ed 193, 194. Moore v. Mississippi, 21 Wall. 636, 22 L. ed. 653; Bolling v. Lersner, 91 U. S. 594, 23 L. ed. 366; Brown v. Atwell, 92 U. S. 327, 23 L. ed. 511; Citizens Bank v. Board of Liquidation, 98 U. S. 140, 25 L. ed. 114; Endowment and Benev. Asso. v. Kansas, 120 U. S. 103, 30 L. ed. 593; Morrow v. Brinkley, 129 U. S. 178, 32 L. ed. 654; Church v. Kelsey, 121 U. S. 282, 30 L. ed. 960; De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125; Blount v. Walker, 134 U. S. 607, 33 L. ed. 1036; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683; Cook County v. Calumet, 138 U. S. 635, 34 L. ed. 1110.*

The decision of the Supreme Court of Georgia is fully supported by the facts and general principles of law.

Let us now lay aside the State law and the decisions of this court above cited and examine the question in the light of the rule that "In cases brought to this court from State courts for review, on the ground that a federal right set up in the State court has been wrongly denied, and in which the State court has put its decision on a finding that the asserted federal right had no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it be without substantial support." *Truax v. Corrigan, 257 U. S. 312, 324, 66 L. ed. 254, 259, 27 A. L. R. 375, 381.*

Is the finding of the Supreme Court of Georgia that petitioner waived his right to urge that the jury lists were wrongly prepared without substantial support? The finding is not without substantial support in *fact,* for the facts are undisputed that petitioner did not raise the question on his trial but stood silently by and took his chances of an ac-

quittal, and after conviction refused through present counsel the established and orderly procedure of motion for new trial and writ error, deliberately electing to seek to nullify the trial by habeas corpus.

The finding of waiver is not without substantial support in *law*, for it has always been the law in Georgia that questions as to the formation of juries must be presented on the trial or in proper cases by motion for new trial and that such questions might not be raised by habeas corpus which is no substitute for writ of error. *Smith v. Milton, 149 Ga. 28 (2, 3), 30, 31; Carter v. State, 143 Ga. 632 (2c), 639; Teem v. Cox, 148 Ga. 175 (a).* It is not without substantial support in law for the principle asserted by the courts of Georgia is one of general acceptation. *Ex parte Warris, 28 Fla. 371, 9 Sou. 718; Ex parte Prince, 27 Fla. 196, 9 Sou. 659, 26 Am. St. R. 67; Ex parte Bowen, 21 Fla. 214, 6 Sou. 65; Potsdamer v. State, 17 Fla. 895; In Re Corcoran, 6 Ida. 657, 59 Pac. 18; In Re Davies, 68 Kans. 791, 75 Pac. 1048; In Re McElroy, 10 Kans. App. 348, 58 Pac. 677; State v. Fenderson, 28 La. Ann. 82; Ex parte Phillips, 57 Miss. 357; In Re Betts, 36 Nebr. 282, 54 N. W. 524; Ex parte Twohig, 13 Nev. 302; In Re McNaught, 1 Okl. Cr. 528, 99 Pac. 241; Ex parte Springer, 1 Utah 214; Ex parte Jackman, 31 Nev. 106, 100 Pac. 769; Ex parte Wilkins, (Ok. Cr.), 115 Pac. 1118; In Re Newcomb, 56 Wash. 395, 105 Pac. 1042; Younger v. Hehn, 12 Wyo. 289, 109 Am. St. R. 986.*

Certainly the law of Georgia in this connection cannot be said to be without substantial support, when it is the same rule as that applied in this court. *Ex parte Harding, 120 U. S. 782, 30 L. ed. 824; Ex parte Wilson, 140 U. S. 575, 35 L. ed. 513, 515; Keizo v. Henry, 211 U. S. 146, 148, 149, 53 L. ed. 125, 126; In Re Moran, 203 U. S. 96, 104, 51 L. ed. 105, 108; Harlan v. McGouin, 218 U. S. 442, 451, 54 L. ed. 1101, 1106; United States v. Gale, 109 U. S. 65, 27 L. ed. 857; In Re Schneider, 148 U. S. 162, 37 L. ed. 406.*

The laws of Georgia afforded petitioner ample opportunity to attack the jury lists of Cobb County. He was permitted to make such attack before trial. He was permitted to make such attack during trial. He was permitted, if he did not sooner know the facts of claimed illegality in the lists, to make such attack after the trial by motion for new trial. But the laws of Georgia did not permit him to withhold his attack until after conviction and for the first time then assault the indictment and trial for claimed illegality in the formation of the juries. If the reasonableness of these laws were not supported by the authority of the decisions of this court and the other courts cited above, it would nevertheless be true that their propriety would rest upon the solid foundation of principle, and it could not be held that the courts of Georgia were powerless to make and enforce such laws, or that such laws were without substantial support and prohibited by the Federal Constitution.

It is true petitioner's claim is that the Fourteenth Amendment has been violated, and the State court has held that petitioner has waived his right to attack the jury lists for asserted illegality in the violation of the equality clause of that Amendment. But this does not change the result. Constitutional rights may be waived just as other rights may be waived. *Frank v. Mangum, 237 U. S. 309, 59 L. ed. 969; Meyers v. Whittle, 171 Ga. 509.* The right to trial by jury may be waived. *Patton v. U. S., 281 U. S. 276, 74 L. ed. 854.* If the full right of jury trial may be waived, certainly the lesser right to insist upon a jury formed in a particular manner may likewise be waived. "Laws made for the preservation of public order or good morals cannot be done away with or abrogated by any agreement; but a person may waive or renounce what the law has established in his favor, when he does not thereby injure others or affect the public interest." *Code of Georgia of 1933, Sec. 102-106.* "As a prisoner may waive even a trial itself, and be capitally punished upon his own confession of guilt, he may waive every minor right or privilege. The greater includes the

less, or the whole the parts." *Sarah v. State, 28 Ga. 576 (2).*

The greater number of constitutional rights arise out of constitutional provisions passive in their nature and character, and require for their enforcement the application of established rules of practice and procedure. It necessarily follows that such rules of practice and procedure must be complied with or the constitutional right lost for want of seasonable assertion. Did the Constitution makers intend otherwise, the Constitutional provision would not have been passive, but self-enforcing.

The rule applied by the Supreme Court of Georgia is the same as the rule applied by the Supreme Court of the United States.

Now let us proceed further and entirely lay aside the State law and general rules and principles, and assume that such law and principles became null and void when petitioner in his habeas corpus petition invoked the equality clause of the Fourteenth Amendment. The result is the same. For the Fourteenth Amendment could not give petitioner greater rights in the State courts than he would have had in a similar proceeding in the United States courts, and had petitioner made his claim of illegality in the jury lists by habeas corpus brought in the United States courts he would have found the federal rule in the premises the same as the State rule, to-wit, that it was too late for him to raise the question.

"It is not sufficient reason for a United States court to discharge on habeas corpus one imprisoned under conviction of murder in a State court that he is restrained of his liberty in violation of the Constitution and laws of the United States, in that persons of his race were arbitrarily excluded, solely because of their race, from the panel of jurors summoned for the term of the court at which he was tried, and because the State court denied him the right to

establish that fact by competent proof, if the State court had jurisdiction both of the offense charged and of the accused.

"If a State court, having entered upon the trial of a criminal case, commit errors in the conduct of the trial to the prejudice of the accused, his proper remedy is after final judgment of conviction, to carry the case to the highest court of the State having jurisdiction to review that judgment, thence upon writ of error to this court, if the final judgment of such State court denied any right, privilege, or immunity specially claimed, and which was secured to him by the Constitution of the United States.

"When a State court has entered upon the trial of a criminal case, under a statute not repugnant to the Constitution of the United States, and has jurisdiction of the offense and of the accused, no mere error in the conduct of the trial should be made the basis of jurisdiction in a court of the United States to review the proceeding upon writ of habeas corpus." *Andrews v. Swartz, 156 U. S. 272, 39 L. ed. 422 (3, 4, 5).* To the same effect, see, *Wood v. Brush, 140 U. S. 278, 35 L. ed. 505; Jugiro v. Brush, 140 U. S. 291, 35 L. ed. 510.*

PETITIONER WAS GIVEN THE BENEFIT OF COUNSEL

The Law of Georgia is that an accused must be furnished counsel and this law was complied with.

Petitioner contends he was deprived of due process of law in that he was denied the benefit of counsel for that there was no "effective appointment of counsel to aid him in his defense." (Page 2 of petition for certiorari.)

In Georgia, Article I, Sec. I, Par. 5 of the Constitution provides "every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel." *Code of Georgia of 1933, Sec. 2-105.* "So deeply

grafted in our practice has this great right become that none are so poor or so low but that they may rely upon it. If it be so that they are unable to retain counsel, the courts will appoint counsel for them, without charge to the defendant. The same duties and responsibilities rest upon counsel thus appointed as if they received the fullest pecuniary compensation." *Martin v. State, 51 Ga. 567, 568. Elam v. Johnson, 48 Ga. 348.* ". . . the benefit of counsel . . . is a privilege which belongs to every citizen of this State, without the slightest reference to his condition in life, and cannot be legally denied him by the courts. The law in its humanity recognizes this right and privilege, and the legal profession, be it said to its credit, has never, so far as we are informed, in any case, in any court, in this State permitted any man, however humble and helpless he may have been, to be put upon trial for the commission of any offense without providing for him the means of enjoying this privilege. The most indigent of criminals, under the benign system which prevails in this State, have on many occasions been furnished with the ablest and most learned of lawyers to represent them before the courts, without fee or reward or the hope thereof. Our courts have uniformly adopted the practice of assigning counsel to represent them. Even pleas of guilty have been rarely accepted until counsel assigned to the defense of such criminals have looked into the merits of the cause and recommended their acceptance by the court." *Delk v. State, 99 Ga. 667, 669, 670.* "The deprivation of counsel is such a fundamental and radical error that it operates to render the trial illegal and void," and in Georgia is ground for habeas corpus after conviction. *Wilcoxon v. Aldredge, 192 Ga. 634, 639.*

The Supreme Court of Georgia recognized the law of the State to be as stated and reiterated and reaffirmed that law, and held the evidence on the habeas corpus trial, together with the evidence proffered by petitioner but excluded as irrelevant, "demanded the finding that the applicant was not denied the benefit of counsel." *Wilcoxon v. Aldredge,*

193 Ga. 661. It is thus judicially determined and established in this case that petitioner was afforded the benefit of counsel as required by the laws of Georgia. *Michigan Central Railroad v. Powers, 201 U. S. 245, 290, 291, 50 L. ed. 744, 760; Menharts and Manufacturers National Bank v. Commonwealth, 167 U. S. 461, 462, 463, 42 L. ed. 236, 237; Smith v. Jennings, 206 U. S. 276, 278, 51 L. ed. 1061, 1063; Burt v. Smith, 203 U. S. 129, 135, 51 L. ed. 121, 127; King v. West Virginia, 216 U. S. 92, 101, 54 L. ed. 396, 401; Barrington v. Missouri, 205 U. S. 483, 486, 51 L. ed. 890, 894; Brown v. New Jersey, 175 U. S. 172, 174, 44 L. ed. 119, 120.*

Whatever duty as to counsel the Fourteenth Amendment imposes upon the States was complied with here, for petitioner had the benefit of able counsel.

Petitioner is now contending, however, that his rights under the Federal Constitution were violated. But his contention calls for a *factual* determination of the same question as that determined by the Supreme Court of Georgia, and petitioner cannot successfully maintain his claimed denial of federal right without a finding at variance with that of the Supreme Court of the State upon the facts, for though the rights of petitioner under State and federal law are different in that they arise under separate Constitutions to the protection of both of which petitioner is entitled, the question of whether petitioner has been denied his asserted rights depends in both instances upon a single state of facts. And that being true, a proper regard for our dual system and the comity prevailing between the courts of the State and Nation ought to foreclose the factual question against petitioner. But we put this matter aside and proceed to the rights of petitioner under the United States Constitution and entirely apart from any factual findings by the courts of the State.

The Sixth Amendment provides "In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." But this Amendment

applies only to the National government and not the States. *United States v. Dawson, 15 Howard (U. S.) 467, 487, 14 L. ed. 775, 783; Twitchell v. Pennsylvania, 7 Wall. (U. S.) 321, 325, 19 L. ed. 223, 224; Spies v. Illinois, 123 U. S. 131, 166, 31 L. ed. 80, 86; In Re Sawyer, 124 U. S. 200, 219, 31 L. ed. 402, 408; Brooks v. Missouri, 124 U. S. 394, 397, 31 L. ed. 454, 457; Eilenbecker v. District Ct., 134 U. S. 31, 34, 35, 33 L. ed. 801, 803; West v. Louisiana, 194 U. S. 258, 263, 48 L. ed. 965; Howard v. Kentucky, 200 U. S. 164, 172, 50 L. ed. 421, 425.* "The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment"; and the Fourteenth Amendment does not require the State to provide an accused with the benefit of counsel in every case. *Betts v. Brady, decided June 1, 1942, 86 L. ed. 1116, 1120.*

While the Fourteenth Amendment does not require counsel in every case, that Amendment does require "due process of law." "The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case." *Betts v. Brady, 86 L. ed. 1117, 1120.* "The concept of due process is not technical. Form is disregarded if substantial rights are preserved. In whatsoever proceeding, whether it affect property or liberty or life, the Fourteenth Amendment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life." Per Roberts, J. in *Snyder v. Massachusetts, 291 U. S. 97, 127.*

Certainly in some cases and under some circumstances due process would require some assistance from counsel. The precise requirements of the Fourteenth Amendment in this regard are unimportant in this case and need not be determined, for under any standard and judged and meas-

ured by any rule petitioner was afforded both due process of law and the full aid, assistance and benefit of counsel. "The totality of facts" in the case will now be drawn from to demonstrate the correctness of this statement.

A substantial difference between the allegations of the petition and the proof on the habeas corpus trial will be noted. On that hearing the evidence authorized a finding of facts as follows: Mrs. Eunice Powell was raped at her home in Cobb County, not far from Marietta, the County Site, before dawn in the early morning hours of September 22nd, 1940. At about nine o'clock following, officers arrested petitioner, Lewis Wilcoxon, at his home nearby and charged him with the crime. He was carried before Mrs. Powell. According to the allegations of his petition he confessed. He was taken to the Fulton County jail in Atlanta, where from time to time he was visited by relatives. While confined in the jail he engaged a fellow inmate, Ernest White, (colored), to write letters to certain persons, furnishing White a memorandum in his (Wilcoxon's) handwriting stating the names of these persons and what he wanted them to testify in his behalf, in the nature of an alibi, and explanatory of his trousers which were wet as with early morning dew when he was arrested. These persons were his father, J. C. Wilcoxon, and his brothers, Willis and Eddie. Ernest White (to whom Wilcoxon substantially admitted the crime), realizing the nature of the request, wrote the letters but afterwards destroyed them.

On November 1st or 2nd, 1940, Judge J. H. Hawkins of the Blue Ridge Judicial Circuit, Cobb County being in that Circuit, notified Mr. Claude Hicks, of the Marietta Bar, that he and Mr. Charles Pigue, of that Bar, would be appointed to represent Wilcoxon. Mr. Hicks immediately informed Mr. Pigue. On Monday, November 4th, these gentlemen were formally appointed by the court, and on Tuesday (the court being in session) were granted leaves of absence to go to Atlanta to confer with accused, which they did that day.

Mr. Hicks was at that time one of the younger members of the Cobb County Bar. Mr. Pigue had then been practicing law since 1915 and enjoyed one of the largest practices at that Bar.

Messrs. Pigue and Hicks interviewed accused in the Atlanta jail and obtained from him his contentions as to the case and a list of witnesses by whom he stated he could establish an alibi, to-wit: Willis Wilcoxon, Mr. and Mrs. L. F. King, Eddie Wilcoxon, Marie Wilcoxon, Maud Hill and another woman. (Second Bill of Exceptions to Supreme Court of Georgia, p. 16.) Mr. Ward, county policeman, and Geo. McMillian, Sheriff, were present at the interview. (See trial brief of evidence attached to Second Bill of Exceptions, pp. 11-12.)

The witnesses whose names were furnished by defendant were subpoenaed. Mr. Pigue studied the case and the law applicable thereto. On Friday, November 8th, the case was called for trial, the grand jury having indicted on the 6th. Mr. Pigue called the names of said witnesses. Mr. King and a woman responded. Mr. Pigue conferred with Mr. King and found that his testimony and that of his wife were not relevant; all they knew was that accused had gotten off Mr. King's truck in Marietta the afternoon of the day preceding the crime. Mr. Pigue conferred with the woman present (sister-in-law of accused) and she knew no facts tending to establish an alibi (contrary to what accused has said she knew) and further told Mr. Pigue that the other witnesses subpoenaed "were not going to have anything to do with it." Mr. Pigue then conferred with Wilcoxon as to whether the case should be continued until the following week, telling him the things just stated. Wilcoxon upon learning that his relatives were not going to swear an alibi for him stated he did not wish the case to be continued. Accordingly, no motion for continuance was made and the trial proceeded.

On the trial the witnesses for the State were thoroughly cross-examined by counsel and all facts tending to create

any doubt of accused's guilt were fully developed, as appears from the transcript of the proceedings in this record. When the State rested its case an adjournment was obtained during which the case as developed by the evidence was explained to accused to enable him the better to make the unsworn statement permitted under Georgia law. *Code of Georgia of 1933, Sec. 38-415.* He made such statement and the case was duly argued by counsel and submitted to the jury under instructions of the court.

Each of the attacks on appointed counsel answered.

Petitioner makes the following complaints as to his counsel, all of which we will answer, to-wit: (1) but one interview was had with accused prior to trial; (2) third persons were present at this interview; (3) witnesses were not interviewed prior to day of trial; (4) no motion for continuance was made; (5) no motion for new trial was made; (6) counsel made no attack on the jury lists of Cobb County.

(1) *But one Interview:* It is not stated whether two or twenty interviews are necessary to constitute due process of law and the benefit of counsel. We think the true rule to be that such number of interviews of accused is necessary, as in the reasonable judgment of counsel is sufficient for the particular case. There is here no suggestion that a rape had not been committed. Accused at one time stated that one Manuel Hill was the guilty person. (Testimony of George McMillian in trial brief of evidence.) The contention of accused to his counsel was that he was not the person committing the crime. This contention he proposed to establish by the testimony of relatives whose names he furnished. These things were disclosed to counsel in the interview four days before trial and no more could have been disclosed by accused in many interviews or conferences. The single interview was sufficient. Certainly counsel were authorized to reasonably conclude it to be sufficient.

(2) *The Presence of Third Persons at the Interview:* This fact was actually turned to petitioner's advantage by

his counsel in their cross-examination of Geo. McMillian, sheriff of Cobb County, proving by him the declarations of innocence then made by petitioner. Petitioner knew the identity of the other persons present. He did not request a private audience with his counsel. It does not appear anything could have been gained by a private audience. There may be some cases in which private consultation is necessary, as where accused in order to relate his whereabouts at the time of the crime and thus show his innocence by an alibi, is compelled to disclose the commission of another crime or other facts tending to humiliate or degrade him, but there is no suggestion of any such thing in this record. In every case it must be discretionary with accused and counsel whether private audience is had. Certainly it cannot be said that when accused does not suggest or request such private consultation and no reason therefor appears and no resulting benefit could have been obtained, the failure of counsel to require it is such a defect as amounts to impairment of constitutional right vitiating the trial.

(3) *Witnesses Not Interviewed Prior to day of Trial:* In some cases involving complicated facts the details of which are important, it might be indispensable that the witnesses be interviewed at length. This was not such a case. Accused was either at home at the time of the crime, or he was not at home. His witnesses could either testify to the simple fact of his presence at his home, or they could not. There was nothing about which to interview the witnesses. Simple consultation with them at the court house was sufficient. Certain it is that counsel were authorized to conclude such to be sufficient without being held to be "so ignorant, inexperienced, or grossly lacking in appreciation of their responsibility" that their services amounted "to virtually no representation," and amounted to want of due process.

(4) *No Motion for Continuance:* Accused sought to suborn his kinspeople to perjury in his behalf. His plans

failed. His alleged witnesses, though subpoenaed, failed to appear, except for his sister-in-law who brought, along with her own declaration that she knew nothing which could help him, their message that they "were not going to have anything to do with it." (Testimony of Mr. Pigue on habeas corpus trial, pp. 16-20 Second Bill of Exceptions to Supreme Court of Georgia.) When he heard this he instructed counsel not to move for continuance and to proceed with the trial. Accused may not under these circumstances now contend counsel were derelict in failing to ask for continuance. Counsel of course did not know of the attempt to suborn, but, upon discovering that the sister-in-law knew nothing of what accused had claimed she knew and that the others "were not going to have anything to do with it," and upon accused himself not desiring that the case be postponed because of the absence of the alleged witnesses counsel were certainly justified in proceeding to trial. Accused knew whether or not he was at home the night of the crime. He knew this better than all other persons in the world. He knew whether his alleged witnesses could truthfully swear to an alibi. Counsel were authorized to accept *his judgment* in the matter of the absence of the witnesses. Compare, *Avery v. Alabama, 308 U. S. 444, 84 L. ed. 377.*

(5) *No Motion for New Trial:* The guilt of accused was clearly established as appears from the transcript of the proceedings. There was no error of law on the trial. It was not the duty of counsel under these circumstances to move for new trial. On the contrary, it was their duty as officers of the court owing a duty to the court and the public, not to do anything merely to obstruct and delay the due imposition of proper sentence upon a convicted rapist undoubtedly guilty and so adjudged after full and fair trial. To hold otherwise, would be to, by judicial decision, remove the lawyer from his high place as the minister of justice to that low and base station where, in a criminal case, he would be but the servant of crime and the instrument of criminals.

See, *Fambles v. State, 97 Ga. 625, 629; Wilcoxon v. Aldredge, 193 Ga. 661, 663, 664.*

The petition for habeas corpus was brought December 6, 1940. At this time motion for new trial was available, Cobb Superior Court not having adjourned. (Affidavit of Judge Hawkins, Second Bill of Exceptions to Supreme Court of Georgia, pp. 21-22.) Had a new trial been desired, counsel who brought the habeas corpus petition could have filed a motion therefor.

(6) *No Attack Made on the Cobb County Jury Lists:* Evidence designed to show the illegal formation of these jury lists in that colored persons were excluded therefrom on account of their color was offered on the habeas corpus trial as illustrative of the charge petitioner was denied the benefit of counsel. The habeas corpus judge refused to admit this evidence because it was irrelevant, and the Supreme Court of Georgia held the ruling correct, saying: "As to this evidence, it may be said that unless the attorneys who were appointed for the accused had knowledge or notice that the jury commissioners had not complied with the law, they were authorized to assume that the commissioners had fully performed the duties required of them. Therefore, in the absence of anything to show that the attorneys knew or had notice that the jurors were improperly selected, evidence of the alleged resulting defects and of failure of the attorneys to raise the question would not tend to show incompetency on their part, and the proffered evidence was properly excluded for irrelevancy." *Wilcoxon v. Aldredge, 193 Ga. 661, 666.* The Supreme Court, however, went further and considered the proffered evidence and held that it and the evidence admitted demanded a finding against petitioner, and in that judgment the Supreme Court was correct for the reasons now to be stated.

The object of legal investigation is the discovery of the truth, and the function of counsel in a criminal case is to see that accused is given a fair trial before an impartial

jury. Counsel appointed for petitioner were authorized to exercise their experience, wisdom, learning and judgment in determining whether to attack or not to attack the jury lists of the county for exclusion of colored persons. They were not absolutely bound and required in every case to challenge the legality of the lists. They were bound and required to do so if such attack would benefit accused. But unless it would benefit him they were not only not required to make the attack but their duty would be to refrain from making it. Counsel knew the men on the jury lists (Cobb County is a rural Georgia County where everybody knows the lawyers and the lawyers know everybody), and were authorized to conclude that accused would receive a fair, just and impartial trial before a jury selected from the lists as formed. That their conclusion was correct is shown by the record. The conviction of accused did not result from want of an impartial jury but because the evidence required a finding of guilty.

Counsel appointed for accused were not bound and required in all events to attack the legality of the lists from which the indicting grand jury was formed. As said by the Supreme Court of Georgia: "In the conduct of a trial broad latitude of advice, direction, and policy in the interest of the client is essentially vested in counsel. If the indictment could be quashed on account of some infirmity, and the defendant could be reindicted and put on trial under a sufficient indictment, counsel even if knowing of such defect might reasonably conclude upon some ground that it would be better for his client to waive the defect and proceed to trial, speedy trial itself being one of the things considered desirable, in both the State and Federal Constitutions, especially as to an accused who is innocent, as the applicant here was presumed to be before his conviction." *Wilcoxon v. Aldredge, 193 Ga. 661, 666.*

The following reasoning of the Supreme Court of the State is unanswerable: "It appeared from the evidence that

one of the attorneys had been a member of the bar for more than a quarter of a century, and was well experienced in the trial of both civil and criminal cases. Conceivably, from experience and observation, he might have believed in good faith that the fate of his client would be just as safe in the hands of the grand and traverse jurors actually chosen by the jury commissioners, as with any that might be chosen for the lists and boxes upon revision according to any standard, and ultimately called for service. He might reasonably have thought that the jurors whose names were already in the jury-boxes were fair and impartial, and, even though they were not of defendant's own race, that they could be depended on to deal justly with him according to the evidence, no less than would jurors of his own race or jurors selected in part from both races. Again, if the lists should be revised, there would be uncertainty as to what individuals of all listed by the jury commissioners might at any time be summoned for service, and it might have been considered advisable to rest upon the known rather than to speculate upon the unknown." *Wilcoxon v. Aldredge, 193 Ga. 661, 666, 667.*

The foregoing argument has proceeded upon the theory that counsel appointed for petitioner knew that from the jury lists of Cobb County colored persons were illegally excluded on account of their race. Such however was not actually the case. For colored persons were not excluded from said lists on account of their color, and the evidence proffered by petitioner failed to show that they were so excluded.

Petitioner's evidence consisted of an extract from the 1930 United States Census, (Exhibit A to Second Bill of Exceptions to Supreme Court of Georgia), and parts of certain depositions of John D. Collins, tax collector of Cobb County, (p. 7 of said Bill of Exceptions), John T. LeCroy, clerk superior court of Cobb County, (pp. 8-9 of said Bill of Exceptions), and R. C. Smith, a jury commissioner of

Cobb County, (pp. 9-11 of said Bill of Exceptions). From the census extract it appeared that the population of the County in 1930 was 35,408, made up of 28,787 native white people, 78 foreign born white people, 6,540 colored people, and 3 people of other races; and that 4.9 per centum of the white people were illiterate and 13.2 per centum of the colored people were illiterate. Mr. Collins testified there were 9,000 white taxpayers in the county and 1,000 colored taxpayers. Mr. LeCroy testified the present grand jury box contained the names of 300 white taxpayers; and the traverse jury box the names of 1,200 white taxpapers and 5 colored taxpayers. The boxes are revised every two years, and the last revision was August, 1940. Mr. Smith testified the jury commissioners selected names for grand and traverse jurors from the lists of white and colored taxpayers, selecting the most upright and intelligent men for traverse jurors and the most upright, intelligent and experienced men for grand jurors. "The law is what we go by. If a man qualifies under the law we use him. We can't use all of them. Some are taken out when we revise. When we revise we take out some and put in others. We don't use the same bunch always. . . . Some of them don't measure up. . . . I don't know how many times a man might serve in ten years. I have been a commissioner six years and previous to that time I have been drawn only one time in ten years. . . . I have lived in Cobb County all my life, sixty-four years. I have never known of a negro serving on a grand jury or petit jury in this county. We feel like if a negro qualifies under the law he should be used. I do not feel that any of the negroes are qualified (for grand jury). . . . I haven't heard that negroes shouldn't serve on the jury. I don't feel that way about it. If they qualify under the law they should have that right."

Under the law of Georgia grand and traverse jurors are drawn by the judge presiding from separate boxes in which are placed the names of persons selected by the jury commissioners, *(Code of Georgia of 1933, Sec. 59-108)*, who are

required to revise the lists every two years. Upon the commissioners is placed the duty of compiling the lists, the law providing "The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors . . . (and) shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors. . . ." *Code of Georgia of 1933, Sec. 59-106.* This law is pursuant to Sec. XVIII, Par. 1, of the Constitution providing "The General Assembly shall provide by law for the selection of the most experienced, intelligent and upright men to serve as grand jurors, and intelligent and upright men to serve as traverse jurors. Nevertheless, the grand jurors shall be competent to serve as traverse jurors." *Code of Georgia of 1933, Sec. 2-4502.* "The constitutional demand is for a jury-list composed of upright and intelligent men; not that every upright and intelligent man be included in the list. Otherwise there would be no exemptions, and every upright and intelligent man must needs be placed on the jury-list to make it legal. Under the Constitution and law it is the sound legal judgment of the commissioners which controls in the number of grand and traverse jurors to be selected. *Thomas v. State, 67 Ga. 460; Wilson v. State, 69 Ga. 224; Rawlings v. State, 124 Ga. 38." Davis v. Arthur, 139 Ga. 74, 79.* The law of Georgia does not permit the exclusion of taxpayers from the jury lists on account of race *(Bashlor v. Bacon, 168 Ga. 370, 374; Wilson v. State, 69 Ga. 224, 236, 237);* and if said lists are wrongly compiled mandamus at the instance of citizens and taxpayers will lie to compel a revision by the jury commissioners. *Davis v. Arthur, 139 Ga. 74 (1); Bashlor v. Bacon, 168 Ga. 370.*

In Georgia questions of fact in both law and equity cases are determined by juries, and in criminal cases the Constitution provides the juries are the judges both of the law and the facts. *Code of Georgia of 1933, Sec. 2-201.* The grand jury is the grand inquest over all county govern-

ment. *Code of Georgia of 1933, Chapters 59-2 through 59-6.* There is nothing in the Federal Constitution which attempts to regulate the juries in the States and the States are at liberty to adopt the highest of standards in the selection of jurors for their courts. Neither State nor National citizenship confers any right to occupy the office of juror. "The law passed by the General Assembly for the purpose of carrying into effect the constitutional provision does not require that all persons possessing the constitutional qualifications shall be selected. It reposes in the jury commissioners not only the authority to determine what men have these qualifications, but how many of such men shall be selected for jury duty in the county. The jury commissioners may select all belonging to this class, or they may select a lesser number. The jury-list of the county is not to be made up of any given number, but this is a matter left to the discretion of the county commissioners. The number of persons selected for jury service is to be determined by the county commissioners in the exercise of a wise discretion, taking into consideration the whole number of persons liable to jury service, the volume of business to be transacted in the various courts which requires the presence of jurors, as well as the facilitation of business in such courts. They should keep in mind on the one hand the rights of those entitled to a jury trial, whether in civil or criminal cases, and on the other hand the rights of those subject to jury duty, making the list embrace such a number as will enable the courts to be carried on according to the spirit of the Constitution and the law, and at the same time not making the number so small that jury service would become burdensome upon those selected for that duty. One placed upon the jury list by the commissioners is, so far as jury service is concerned, declared to be intelligent and upright. But the fact that a person's name is not upon the jury-list of the county is no evidence that he is not intelligent and upright, nor that the commissioners did not consider him as such." *Rawlins v. State, 124 Ga. 31, 38, affirmed, 201 U. S.*

638, 50 L. ed. 899. "A state law conferring judicial powers on jury commissioners in selecting jurors does not for that reason conflict with the Fourteenth Amendment to the Federal Constitution." *Murray v. Louisiana, 163 U. S. 101, 41 L. ed. 87 (4).* The Constitution and laws of Georgia "simply provide for an exercise of judgment in attempting to secure competent jurors of proper qualifications." *Franklin v. South Carolina, 218 U. S. 161, 168, 54 L. ed. 980, 985; Williams v. Mississippi, 170 U. S. 213, 42 L. ed. 1012.*

Petitioner apparently proceeds upon the idea that the Fourteenth Amendment requires that the names of colored persons be placed upon the grand and traverse jury lists of the States. This is a misconception. That Amendment does not require that colored persons be placed on said lists. It does not require that white persons be placed on said lists. It does not require that any particularly class of persons be placed on said lists. The purpose of the Amendment is precisely to the contrary. That purpose is that membership in a particular class or race or color confers no greater right than membership in another class or race or color; and that there must be no discrimination in favor of or against any person by reason of his race or condition. That Amendment simply gives force and effect to the principle of republican institutions that all men are equal before the law, and simply gives the petitioner here the right to require that in the formation of the jury lists "there shall be no exclusion of his race, and no discrimination against them, because of their race or color." *Martin* v. *Texas, 200 U. S. 316, 321, 50 L. ed. 497, 499; Thomas v. Texas, 212 U. S. 278, 282, 53 L. ed. 512, 514.* In the light of the Constitution and laws of Georgia, the Fourteenth Amendment merely requires that the jury commissioners, in the exercise of a wise discretion, select from the taxpayers of the county a sufficient number of "upright and intelligent men to serve as" traverse jurors, and from such number then select a lesser number, "not exceeding two-fifths of the whole number, of the most experienced, intelligent and up-

right men to serve as grand jurors''; and that in making such selection no regard be had as to and no discrimination be indulged for or against any race or color.

Petitioner does not contend the Constitution or laws of Georgia discriminate against colored persons. He contends there was actual discrimination by the jury commissioners in the enforcement of the laws. Did the evidence proffered by him establish such actual discrimination against colored persons *on account of their color* in the formation of the Cobb County jury lists? The answer plainly is that it did not. ''Such an actual discrimination is not presumed. It must be proved or admitted.'' *Tarrance v. Florida, 188 U. S. 519, 520, 47 L. ed. 572, 573.* The burden is upon petitioner to establish the asserted discrimination. *Martin v. Texas, 200 U. S. 316, 50 L. ed 497; Franklin v. South Carolina, 218 U. S. 161, 167, 54 L. ed. 980, 985.*

The fact (if it be such) that no colored man had served on a jury during the recollection of Mr. Smith can not avail petitioner. For petitioner can be concerned only with illegality in the lists covering the period of his indictment and trial. Prior illegality can not help him. The lists with which petitioner is concerned were established in August, 1940, and he must prove illegality in the formation of these lists. That the grand jury list contained the name of no colored taxpayer established no discrimination against colored men as such. ''. . . discrimination in organizing a grand jury . . . can not be established by merely proving that no one of the defendant's race was on (the jury) . . . an accused person can not of right demand a mixed jury, some of which shall be of his race, nor is a jury of that kind guaranteed by the Fourteenth Amendment to any race.'' *Thomas v. Texas, 212 U. S. 278, 282, 53 L. ed. 512, 514; Martin v. Texas, 200 U. S. 316, 50 L. ed. 497.* That the traverse jury lists contained the names of but five colored men, by like token, established no discrimination. On the contrary, it showed fair and impartial selection by the commissioners without regard to race or color. The testimony

is that colored taxpayers were not discriminated against on account of their color in the formation of the lists. As Mr. Smith testified: "I haven't heard that negroes shouldn't serve on the jury. I don't feel that way about it. If they qualify under the law they should have that right." This testimony is uncontradicted. The fact, proved by petitioner, that all the colored people of the county were literate except 13.2 per centum of them, while to the credit of both races, cannot help his charge of discrimination. For mere literacy is not sufficient qualification in Georgia for jury service. It is significant that petitioner brought forward the name of no single colored citizen against whom he could claim the jury commissioners had discriminated. He did not suggest any single colored man he thought ought to be on the jury lists. The charge of discrimination is wholly unwarranted and unfounded, and can be sustained only by disregarding the evidence, ignoring actualities, putting aside the law, imputing a want of integrity in the jury commissioners of Cobb County, and indulging at a distance in unsupported theoretical conjecture and speculation.

Let us assume, however, that the proffered evidence would upon some theory have authorized some court to find unlawful discrimination in the formation of the lists. Can it be said that counsel appointed for petitioner were required to reach that factual conclusion at the peril of having the trial declared void for want of due process, no matter how fairly they may have entertained a contrary conclusion?

Petitioner should have made his attack on his counsel by motion for new trial.

Petitioner for another reason was not entitled to be discharged on habeas corpus on his claim that for want of due process of law he was deprived of the benefit of counsel. That other reason is that under the circumstances he was required to urge the question by motion for new trial. It is true that denial of the benefit of counsel under Georgia law

is such a radical error as "operates to render the trial illegal and void," *(Wilcoxon v. Aldredge, 192 Ga. 634, 639);* and that this rule is in accord with the law relative to trials in federal courts. *Johnson v. Zerbst, 304 U. S. 458, 82 L. ed. 1461.* But this rule ought not to be applied in those cases where petitioner in habeas corpus *actually was represented on the trial by appointed counsel and his claim that he was denied the benefit of counsel consists in an attack upon the counsel.* In such cases the attack upon counsel ought to be made by motion for new trial, it being recognized as a ground therefor. *Delk v. State, 99 Ga. 667; Williams v. State, 192 Ga. 247,* (extraordinary motion entertained on that ground); *16 C. J. sec. 264, p. 1145.* The fundamental difference between a case in which accused is afforded counsel who undertake to represent him on his trial, and a case in which no representation at all is afforded accused, is apparent. The case at bar is a good illustration of the wisdom of making the distinction. For here we have petitioner claiming that his trial was null and void because his counsel did not attack the jury lists, and we find the most that can be said respecting the attack upon the lists is that the legality of their formation may have been debatable. Particularly ought motion for new trial be held the only remedy where petitioner had full opportunity to make such motion through counsel who brought the habeas corpus petition. *In Re Wright Lancaster, 137 U. S. 393, 34 L. ed. 713; Holder v. Beavers, 141 Ga. 217; Bass v. Hightower, 94 Ga. 602; 29 C. J., sec. 9, p. 17.* "The alleged assignment, at the trial of the applicant, of one as his counsel, who (although he may have been an attorney-at-law) had not been admitted or qualified to practice as an attorney or counselor at law in the courts of New York (the trial being in the State courts of New York) . . . (was a matter) occurring in the course of the proceedings and trial in a court of competent jurisdiction, proceeding under statutes that do not conflict with the Constitution of the United States. The error, if any, committed by that court in respect to

(this matter) did not affect its jurisdiction of the offense or of the person accused, and can not be reached by habeas corpus." *Jugiro v. Brush, 140 U. S. 291, 35 L. ed. 510, 513.*

It is submitted that to permit a convict, the record of whose conviction appears regular on its face, to attack his trial and conviction by habeas corpus at a time when motion for new trial in the court of conviction is available, is to trifle with the due administration of the criminal law and upset without justification long established principle. It is most important that every constitutional safeguard of the rights of man be protected with the ever-increasing vigilance of courts. It is also important that crime and criminals be punished without undue delay. To permit habeas corpus while other remedy is available is to encourage and promote undue delay. To require motion for new trial while that remedy is yet open or in default thereof hold that the error which could have been thus corrected has been waived, is to safeguard constitutional right and at the same time prevent delay and trifling.

CONCLUSION

We have separately considered the two separate attacks made on the Cobb County trial and have shown that in the premises of neither was petitioner denied any federal right. The result is the same if the two attacks are considered together. Petitioner can have no basis of fact upon which to claim an invasion of constitutional right unless he can maintain he was denied due process through want of counsel. For if he had the benefit of counsel the formation of the jury lists is immaterial on habeas corpus, that being a matter to be raised on the trial by the counsel, questions regarding such matters and whether or not they should be presented being among the reasons counsel are provided for persons accused of crime.

The unsubstantial nature of petitioner's claims is clear. They do not affect the trial courts "jurisdiction of the

offense or of the person accused, and can not be reached by habeas corpus." *Jugiro v. Brush, 140 U. S. 291, 35 L. ed. 510, 513.* "There is no question that the State court had jurisdiction. But the much abused suggestion is made that it lost jurisdiction. . . . There (is) not the shadow of a ground for interference with this sentence by habeas corpus. *Frank v. Mangum, 237 U. S. 309, 326, 59 L. ed. 969, 967.* . . . In so delicate a matter as interrupting the regular administration of the criminal law of the State by this kind of attack too much discretion can not be used, and it must be realized that it can be done only upon definitely and narrowly limited grounds." *Ashe v. Valotta, 270 U. S. 424, 425, 426, 70 L. ed. 662, 664.*

The petition for writ of certiorari to the Supreme Court of Georgia should be denied.

Respectfully submitted,

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